

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF TEXAS (EL PASO)**

<hr/>	§	Chapter 11 (Subchapter V)
	§	
Flix Brewhouse NM LLC,	§	Case No. 21-30676 (HCM)
	§	
Debtor.	§	
<hr/>	§	

**AMENDED AGREED MOTION FOR ORDER EXTENDING DEBTOR'S TIME TO ASSUME OR
REJECT UNEXPIRED LEASE OF NONRESIDENTIAL REAL PROPERTY**

This pleading requests relief that may be adverse to your interests.

If no timely response is filed within 21 days from the date of service, the relief requested herein may be granted without a hearing being held.

A timely filed response is necessary for a hearing to be held.

1. Flix Brewhouse NM LLC, the debtor and debtor in possession (the “**Debtor**”) in the above-captioned chapter 11 case (the “**Case**”) submits this Agreed Motion (the “**Agreed Motion**”) requesting that the Court enter an order extending the deadline for the Debtor to assume or reject the unexpired lease between itself and Village @ La Orilla, LLC (the “**Landlord**,” referred to collectively with the Debtor as the “**Parties**”), through and including August 5, 2022. The Landlord has no objection to the requested extension, and has agreed to the entry of the proposed order attached here as **Exhibit A**. In support of the Agreed Motion, the Debtor states:

JURISDICTION & VENUE

2. The Court has jurisdiction to consider this Agreed Motion under 28 U.S.C. §§ 157 and 1334. This is a core proceeding under 28 U.S.C. § 157(b)(2). Venue of this Case and the Agreed Motion is proper in this district under 28 U.S.C. §§ 1408 and 1409.

3. The statutory predicates for the relief sought in this Agreed Motion are 11 U.S.C. §§ 105, 365(d)(4) *as amended* by Consolidated Appropriations Act, 2021, Pub. L. 116–260, (December 27, 2020) 134 Stat. 1182, Div. FF, Title X, § 1001(f), 1184, Rule 9013 of the Federal Rules of Bankruptcy Procedure (the “**Bankruptcy Rules**”), and Rule 9013 of the Local Court Rules of the United States Bankruptcy Court for the Western District of Texas (the “**Local**

Rules”).

EXECUTIVE SUMMARY

4. The Debtor’s current deadline to assume or reject its Lease (defined below) with the Landlord is April 8, 2022. The Lease, however, is the subject of litigation pending before this Court, and a trial in that litigation has been set to begin two months after the April 8 deadline. 2022. The outcome of this litigation directly influences (a) the Debtor’s ability to assume and cure any amounts owed under the Lease; and (b) the Debtor’s ability to reorganize its business at its current location.

5. The Debtor therefore brings this Agreed Motion, by agreement with the Landlord, seeking to extend its deadline to assume or reject the Lease by approximately 120 days to August 5, 2022, which will allow the litigation to proceed to conclusion, without prejudicing the Debtor’s rights to assume or reject the Lease in this Case.

RELEVANT BACKGROUND

6. The Debtor initiated this Case by filing a voluntary chapter 11 petition on September 10, 2021. (Dkt. 1). The Debtor continues to manage its financial affairs as debtor in possession. The Debtor elected for this Case to proceed under Subchapter V of chapter 11.

7. The Debtor and Landlord are parties to that certain Commercial Real Estate Lease dated August 18, 2015 (the “**Lease**”) between the Debtor as tenant and Landlord as landlord for the premises of the Debtor’s business, located in the Village @ La Orilla shopping center in Albuquerque, New Mexico.

8. The Debtor’s current deadline to assume or reject the Lease is April 8, 2022; 210 days from the petition date in this Case (the “**Original Deadline**”).

9. The Landlord filed a proof of claim in the Case on November 19, 2021 (the “**Proof of Claim**”). The Proof of Claim asserts amounts owed to the Landlord under the Lease.

10. On December 1, 2021, the Debtor, along with co-plaintiff Flix Entertainment LLC, commenced an adversary proceeding (the “**Adversary**”) against the Landlord by filing a

complaint objecting to the Proof of Claim and asserting claims against the Landlord. (AP Dkt. 1). The Adversary is styled *Flix Brewhouse NM LLC and Flix Entertainment LLC v. Village @ La Orilla, LLC*, and is proceeding under case number 21-03029. The Landlord answered the Complaint on January 3, 2022. (AP Dkt. 9).

11. At issue in the Adversary, among other things, is the interpretation of the Lease's *force majeure* provisions and the amount necessary for the Debtor to cure the Lease in the event the Debtor assumes the Lease.

12. To this end, the Debtor filed a proposed plan of reorganization (the "**Plan**") in the Case on December 9, 2021, (Dkt. 92) which has not yet been confirmed. The Plan proposes that the Debtor will assume the Lease based on the Debtor's calculation of the cure amount. The Debtor's ability to confirm the Plan as proposed, therefore, hinges on the outcome of the Adversary.

13. The Court held a scheduling conference in the Adversary on January 5, 2022. Following that hearing, the Court entered a scheduling order which, among other things, scheduled at trial in the Adversary beginning June 8, 2022—two months after the Original Deadline. (AP Dkt. 14).

14. Since the trial date in the Adversary falls two months after the Original Deadline, the Debtor and Landlord have agreed to extend the Original Deadline to August 5, 2022, and request that the Court enter an order, substantially in the form attached to this Agreed Motion granting the extension.

BASIS FOR RELIEF REQUESTED

15. Bankruptcy Code § 365(d)(4), *as amended* by the Consolidated Appropriations Act 2021, provides debtors with an initial 210-day period to assume or reject unexpired leases of nonresidential real property. The court may extend the initial 210-day period for 90 days and may grant any subsequent extensions upon prior written consent of the lessor. *See* 11 U.S.C. § 365(d)(4) *as amended* by Consolidated Appropriations Act, 2021, Pub. L. 116–260, (December

27, 2020) 134 Stat. 1182, Div. FF, Title X, § 1001(f).

16. The decision to grant an extension of the time to assume or reject unexpired leases of nonresidential real property is subject to judicial interpretation and discretion. *See South Street Seaport LP v. Burger Boys, Inc. (In re Burger Boys, Inc.)*, 94 F.3d 755, 760-61 (2d Cir. 1996); *Sterry v. Cannata (In re Cannata)*, 2018 WL 1559767, at *1 (D. Conn. Mar. 23, 2018) Fed. R. Bankr. P. 9006(b) (allowing courts to exercise their discretion to enlarge the time for taking an action in a specified time period so long as the request to extend is made before the expiration of the time originally prescribed)). Furthermore, "[n]othing prevents a bankruptcy court from granting an extension because a particular debtor needs additional time to determine whether the assumption or rejection of particular leases is called for by the plan of reorganization that it is attempting to develop." *Legacy, Ltd. v. Channel Home Ctrs., Inc. (In re Channel Home Ctrs., Inc.)*, 989 F.2d 682, 689 (3d Cir. 1993).

17. In determining whether "cause" exists under to extend the time to assume or reject unexpired leases of nonresidential real property under Bankruptcy Code § 365(d)(4)(B), courts have considered the following non-exhaustive factors:

- a) whether the lease is the debtor's primary asset;
- b) whether the debtor has had sufficient time to intelligently appraise its financial situation and the potential value of its assets in terms of the formulation of a plan of reorganization;
- c) judicial determination of a core issue relating to the lease; and
- d) any other factors bearing on whether the debtor has had a reasonable amount of time in which to decide whether to assume or reject the lease.

See In re Am. Healthcare Mgt., Inc., 900 F.2d 827, 833 (5th Cir. 1990) (discussing the factors relevant to § 365(d)(4) analysis of whether "cause" exists to extend the time to assume or reject unexpired leases); *In re Panaco, Inc.*, No. 02-47811-H3-11, 2002 WL 31990368, at *5 (Bankr. S.D. Tex. Dec. 10, 2002) (citing similar factors); *see also S. St. Seaport Ltd. P'ship v. Burger Boys, Inc. (In re Burger Boys, Inc.)*, 94 F.3d 755, 761-62 (2d Cir. 1996) (same).

18. As discussed above, "cause" exists to extend the Debtor's deadline to assume or

reject the Lease to August 5, 2022. The Adversary remains pending, and a trial will not be held in the Adversary until after the Original Deadline passes. The outcome of the Adversary directly impacts whether the Debtor will be able to assume or reject the Lease. Thus, extending the deadline to August 5 is warranted, to allow the Adversary to proceed to conclusion.

19. If the extension is not granted, the Debtor will be compelled to prematurely assume or reject the Lease without sufficient information about the economic benefit or detriment of the Lease and its impact on the Debtor's ability to reorganize. The Debtor's requested extension decreases the risk of negative consequences for the Debtor's estate, and benefits all stakeholders, including the Landlord.

20. Thus, the Debtor, by agreement with the Landlord, submits that a 120-day extension of the deadline to assume or reject the Lease is appropriate and in the best interests of the Debtor, its estate, the Landlord, and all parties in interest, and the Court should grant the extension.

RESERVATION OF RIGHTS

21. The Debtor reserves its right to seek additional extensions of the time to assume or reject the Lease under the Bankruptcy Code. Nothing contained in this Agreed Motion is intended to be deemed (i) an admission as to the validity of any claim against the Debtor, (ii) a waiver or limitation of the Debtor's rights to dispute the amount of, basis for, or validity of any claim, (iii) a waiver of the Debtor's rights under the Bankruptcy Code or any other applicable nonbankruptcy law, (iv) an agreement or obligation to pay any claims, (v) a waiver of any claims or causes of action which may exist against any creditor or interest holder, or (vi) an approval, assumption, adoption, or rejection of any agreement, contract, lease, program, or policy under Bankruptcy Code § 365 of the Bankruptcy Code.

NOTICE

22. The Debtor will provide notice of this Agreed Motion to (a) the Office of the United States Trustee; (b) the Subchapter V Trustee; and (c) all parties that have filed a notice of

appearance and request for service of papers pursuant to Bankruptcy Rule 2002 and Local Rule 9013(d)-1; and (e) such other persons as directed by the Court. In light of the nature of the relief requested herein, the Debtor submits that no other or further notice is necessary.

NO PRIOR REQUEST

23. No prior request for the relief sought herein has been made to this Court or any other court.

Wherefore, for the reasons set forth above, the Debtor requests that the Court grant this Agreed Motion and enter an order in the form attached to this Agreed Motion, granting the Debtor an extension of approximately 120 days to assume or reject the Lease, to August 5, 2022, and any other further relief the Court deems appropriate under the circumstances.

Date: February 2, 2022

Flix Brewhouse NM LLC

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One of its Attorneys
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing document was served upon those parties on the attached service list who are entitled to receive Court ECF Notification in this case via such notification on this 2nd day of February, 2022.

/s/ Rachael L. Smiley
Rachael L. Smiley

Label Matrix for local noticing
0542-3
Case 21-30676-hcm
Western District of Texas
El Paso
Wed Feb 2 12:44:19 CST 2022

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Flix Brewhouse LLC
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Bypassed recipients 0

Total 72